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NOTE

Revenge Porn and the ACLU's Inconsistent Approach

Elena Lentz*

INTRODUCTION

As of 2016, 10.4 million Americans have been threatened with or been the victim of nonconsensual pornography, more commonly known as revenge porn.¹ Of these victims, eighty percent are women.² Furthermore, the pervasive and anonymous nature of the internet has encouraged the growth of revenge porn and allowed for repeated victimization. As a result, thirty-eight states and the District of Columbia have criminalized revenge porn.³ Several other states have tried to pass revenge porn laws and faced First Amendment challenges. In the twelve states that do not criminalize revenge porn, victims often must rely on either tort law, copyright law, or the federal cyberstalking statute.⁴ Yet, these existing frameworks are often ill-fitted for the unique issues raised by revenge porn. Using the failures of several state initiatives as a guide and recognizing the insufficiency of existing remedies, Congresswoman Jackie Speier (D-CA) began to craft a unified federal statute. In November 2017, Congresswoman Speier introduced the Ending Nonconsensual Online User Graphic Harassment (ENOUGH) Act.⁵ Although the ENOUGH Act includes a number of civil liberty safeguards to address First Amendment concerns,⁶ the American Civil Liberties Union (ACLU) has voiced strong opposition to the bill.

The purpose of this Note is to explore the ACLU's opposition to the ENOUGH Act and other similar state revenge porn statutes. Part I begins with an examination of what revenge porn currently looks like in society. In doing so, this Note highlights how the internet has cultivated an online market for revenge porn and how existing state remedies are not wholly effective to combat this

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¹ Seth Young, *New Report Shows That 4% of U.S. Internet Users Have Been a Victim of "Revenge Porn,"* DATA & SOC'Y (Dec. 13, 2016), <https://datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/>.

² Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 191–92 (2015).

³ See Kelsey Benedick, *Eradicating Revenge Porn: Intimate Images as Personal Identifying Information*, 22 LEWIS & CLARK L. REV. 231, 244 (2018).

⁴ See *infra* section I. B.

⁵ See *Rep Speier and Sens Harris, Burr, and Klobuchar Introduce Bipartisan Bill to Address Online Exploitation of Private Images*, CONGRESSWOMAN JACKIE SPEIER (Nov. 28, 2017), <https://speier.house.gov/media-center/press-releases/rep-speier-and-sens-harris-burr-and-klobuchar-introduce-bipartisan-bill>.

⁶ See Jackie Speier, *The ENOUGH Act of 2017-Ending Nonconsensual Online User Graphic Harassment*, <https://speier.house.gov/sites/speier.house.gov/files/The%20ENOUGH%20Act%20One%20Pager%2011-27-17%20%28002%29.pdf> (last visited Nov. 5, 2018).

marketplace, and further analyzes the substantial harms caused by revenge porn and its disproportionate impact on women. Part II provides a look at the recent state attempts to combat revenge porn and explores the ACLU's involvement with these statutes. Part III outlines the ENOUGH Act and discusses the attempts this federal bill has made to address First Amendment concerns. Additionally, Part III discusses the ACLU's opposition to this federal legislation.

This Note will argue that (1) the ACLU's requirement of an intent standard in the ENOUGH Act is inconsistent with the First Amendment; (2) the ACLU's approach to the ENOUGH Act is inconsistent with the organization's approach in other issues dealing with privacy; (3) the ACLU's position on the ENOUGH Act is inconsistent with the goals of the ACLU's Women's Rights Project and the ACLU's commitment to sexual autonomy; and (4) the ENOUGH Act would greatly benefit from the support of the ACLU, an organization typically at the forefront of civil liberties.

I. THE CURRENT LOOK OF REVENGE PORN

A. *The Marketplace for Revenge Porn*

Revenge porn is defined as “the posting of nude or sexually explicit photos or videos online to degrade or harass someone, usually a former spouse or lover.”⁷ These photos are often accompanied by personal information, such as the target's employer or address.⁸ Through the internet, a marketplace for revenge porn has now opened—a marketplace that has far surpassed the traditional jilted ex-partner scenario.⁹ As of 2016, there were over 2,000 websites dedicated to revenge porn worldwide.¹⁰ These websites allow those who visit the site to comment and tag the photographs so that the photographs can be easily searched by the type of humiliation one wishes to view.¹¹ Websites also allow users to trade photos by offering pictures they have for ones they are seeking.¹² Some of these websites also make a profit from advertisements on the sites.¹³ Many suggest that this emerging

⁷ Liz Halloran, *Race to Stop “Revenge Porn” Raises Free Speech Worries*, NPR (Mar. 6, 2014, 11:16 AM), <https://www.npr.org/sections/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries>.

⁸ See Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul to the First Amendment*, 90 CHI.-KENT L. REV. 247, 247 (2016).

⁹ See, e.g., Danielle Citron and Woodrow Hartzog, *The Decision That Could Finally Kill the Revenge-Porn Business*, THE ATLANTIC (Feb. 3, 2015), <https://www.theatlantic.com/technology/archive/2015/02/the-decision-that-could-finally-kill-the-revenge-porn-business/385113/>.

¹⁰ Sameer Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, CYBERBULLYING RES. CTR., <https://cyberbullying.org/revenge-porn-research-laws-help-victims> (last visited Oct. 15, 2018).

¹¹ See Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CAL. L. REV. 1303, 1324 (2014).

¹² See Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That Is Ruining Women's Lives*, THE N.Y. POST (Sept. 27, 2017, 12:14 AM), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/>.

¹³ See *id.* (giving an example of a revenge porn website, Anon-IB, that makes an estimated \$1,500 a day from advertising revenue).

marketplace of revenge porn “provide[s] an outlet for the hatred, violation, and harm inflicted upon women.”¹⁴

Victims have often found little relief in dealing with the websites to get the pictures removed. Most sites do not retain any information from the posters.¹⁵ Furthermore, many website owners are simply unwilling to help. Hunter Moore, the creator of the most infamous revenge porn site, IsAnyoneUP.com, summed up his feelings about potential harm to victims, stating:

I do not want anybody to ever be hurt by my website—physically . . . I don’t give a fuck about emotionally. Deal with it. Obviously, I’d get a ton of heat for it. But—I’m going to sound like the most evil motherfucker—let’s be real for a second: If somebody killed themselves over that? Do you know how much money I’d make? At the end of the day, I do not want anybody to hurt themselves. But if they do? Thank you for the money.¹⁶

Another popular website, MyEx.com, includes the following warning to victims: “As a general rule if you don’t want photos of you ending up on the Internet be more careful who you send them too [sic] or better yet don’t send them at all.”¹⁷ There have also been instances of websites demanding money for the removal of the pictures.¹⁸ In one instance, a man who posed as a lawyer dedicated to helping victims remove their photos from the website for a fee turned out to be the owner of the website.¹⁹ Situations like this are not uncommon and show the extent to which website owners and users will go to extort and embarrass victims.

B. Existing Remedies

In states that do not criminalize revenge porn, victims must rely on either tort law or copyright law for remedies. However, it is often difficult for victims to get lawyers to take revenge porn cases on a contingent fee basis; defendants often do not have money to pay if the victim is successful.²⁰ The torts that are typically used in a civil claim for revenge porn are intrusion on seclusion, public disclosure of

¹⁴ Poole, *supra* note 2, at 192.

¹⁵ See Samantha H. Scheller, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 564–65 (2015) (“We do not keep any records of the people who post. No emails, no ip addresses, or info.”).

¹⁶ Camille Doderer, *Hunter Moore Makes a Living Screwing You*, THE VILLAGE VOICE (Apr. 4, 2012), <https://www.villagevoice.com/2012/04/04/hunter-moore-makes-a-living-screwing-you/>.

¹⁷ Rachel Bangser, *Criminalizing Nonconsensual Pornography Through Amending and Applying the Federal Cyberstalking Statute 18 U.S.C. § 2661A*, 32 SYRACUSE J. SCI. & TECH. L. 1, 8 (2015-2016).

¹⁸ See, e.g., Kari Paul, *The Federal Trade Commission Moves to Shut Down Revenge Porn Website*, MARKETWATCH (Jan. 9, 2018, 6:40 PM), <https://www.marketwatch.com/story/the-federal-trade-commission-moves-to-shut-down-revenge-porn-website-2018-01-09> (showing how one site demanded between \$499 to \$2,800 to remove photographs and information).

¹⁹ See Joshua Barrie, *A Man Who Ran an Alleged ‘Revenge Porn’ Website Says He’s Now ‘A Different Person’*, BUS. INSIDER (Jan. 30, 2015, 9:33 AM), <https://www.businessinsider.com/craig-brittain-apologises-for-revenge-porn-website-2015-1>.

²⁰ See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 160 (6th ed. 2018).

private facts, publicity that places an individual in a “false light” to the public, defamation, intentional infliction of emotional distress, and appropriation of a person’s likeness.²¹ However, these claims are often unsuccessful because the victim originally consented to having the picture taken.²² Consent creates an absolute shield of liability to any privacy tort or intentional tort so long as the publication does not exceed the scope of the consent.²³ Several scholars have noted that a tort action is also unlikely to result in the removal of the photographs.²⁴

The Communications Decency Act, passed in 1996, gives a great amount of protection to website owners and operators for content published by third parties.²⁵ The Act makes “tort action against the websites that publish nonconsensual pornography virtually impossible.”²⁶ Copyright law solves this problem to a degree, since the website owner may be punished for intellectual property claims.²⁷ Under copyright law, if you take the photograph yourself, you own the photograph;²⁸ if a “selfie” turns up on a website dedicated to revenge porn, the person who took the photograph can file a takedown notice and cite the Digital Millennium Copyright Act of 1998.²⁹ However, this remedy requires that the victim file takedown notices to every website in which the photograph appears.³⁰ An interview with one victim revealed that she spent at least five hundred hours between May and October sending requests to websites on which her photograph appeared.³¹ Yet, copyright laws do not help victims who did not take the sexually explicit photographs themselves. In eighty percent of revenge porn situations, the victim took the explicit photograph,³² but there are also instances where the victim’s partner took the photo without the victim’s knowledge.³³

Another remedy that has been tested is the federal cyberstalking statute:

Whoever with the intent to kill, injure, harass, intimidate . . . uses . . . any interactive computer service or electronic communication service or electronic communication system of interstate commerce . . . to

²¹ See Paul J. Larkin Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 77 (2014).

²² See *id.* at 81.

²³ See RESTATEMENT (SECOND) OF TORTS § 652(f) cmt. b (1977).

²⁴ See Katlyn M. Brady, *Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn*, 28 HASTINGS WOMEN’S L.J. 3, 6 (2017); Aubrey Burris, *Hell Hath No Fury Like a Woman Porneed: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 68 FLA. L. REV. 2325, 2339 (2014).

²⁵ See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 359 (2014).

²⁶ See Burris, *supra* note 24, at 2341.

²⁷ See Citron & Franks, *supra* note 25, at 360.

²⁸ See *id.*

²⁹ Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Nov. 27, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.

³⁰ See *id.*

³¹ See *id.*

³² Burris, *supra* note 24, at 2334 n.37.

³³ See Larkin, *supra* note 21, at 6163 n.21.

engage in a course of conduct that . . . places that person in reasonable fear of death or serious bodily injury . . . or causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress . . . shall be punished.³⁴

While this law seems promising, it was used in only ten cases between 2010 and 2013.³⁵ Like tort and copyright actions, the federal cyberstalking law also does not adequately provide relief. The statute requires that the prosecution show the defendant engaged in a course of conduct, implying that there must be a pattern of repeated behavior. Therefore, “a perpetrator who posted an image just once is unlikely to be convicted, no matter that the single post may have metastasized via downstream distribution.”³⁶ The federal cyberstalking law would also allow defendants who post photographs for purposes other than “to kill, injure, harass, [or] intimidate” to escape punishment.³⁷

C. The Harm Caused by Revenge Porn

Revenge pornography carries with it numerous negative consequences for victims. Some suggest that revenge pornography, like child pornography, causes long-term mental health issues.³⁸ “The humiliation, powerlessness, and permanence associated with these distinct but similar crimes leave victims engaged in a lifelong battle to preserve their integrity.”³⁹ In some cases, revenge porn even leads to suicide.⁴⁰ There are also implications related to employment⁴¹ and college acceptance.⁴² Most employers,⁴³ and some college admissions officers,⁴⁴ check candidates’ online presence to screen them. This can create problems for victims of revenge porn as sexually explicit material is uncovered during the screening.⁴⁵ Also, revenge porn can cause harm more directly in the form of physical threats.⁴⁶ On

³⁴ 18 U.S.C. § 2261A (2)(A)–(B) (2013).

³⁵ See SOLOVE & SCHWARTZ, *supra* note 20, at 161.

³⁶ Erica Souza, “For His Eyes Only”: When Federal Legislation Is Needed to Combat Revenge Porn, 23 UCLA WOMEN’S L.J. 101, 117 (2016).

³⁷ See *id.*

³⁸ See Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359, 362 (2016).

³⁹ *Id.*

⁴⁰ See Benedick, *supra* note 3, at 233; Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1259 (2017).

⁴¹ See Kamal & Newman, *supra* note 38, at 363.

⁴² See Kitchen, *supra* note 8, at 248.

⁴³ See Saige Driver, *Keep It Clean: Social Media Screenings Gain in Popularity*, BUS. NEWS DAILY (Oct. 7, 2018, 2:23 PM), <https://www.businessnewsdaily.com/2377-social-media-hiring.html> (showing that 70% of employers looked at an applicant’s online presence).

⁴⁴ See Darian Somers, *Do Colleges Look at Your Social Media Accounts*, U.S. NEWS (Feb. 10, 2017, 8:00 AM), <https://www.usnews.com/education/best-colleges/articles/2017-02-10/colleges-really-are-looking-at-your-social-media-accounts> (showing that 35% of college admission officers looked at applicants online presence).

⁴⁵ See Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion From Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 364 (2010).

⁴⁶ See Kitchen, *supra* note 8, at 275.

some revenge porn websites, the owner of the site will post complaints made by the victim.⁴⁷ Such behavior has led to users threatening the victim with rape, stalking, or other abuse.⁴⁸ For example, a young woman in Pennsylvania had men coming to her home after an ex-boyfriend posted her pictures and address with an invitation to come “hook up.”⁴⁹

Many instances go even further than solicitations for sex. In Maryland, a man posted information about his ex-wife on a revenge porn website with the heading “Rape Me and My Children” and fifty men showed up at her home and attempted to break in.⁵⁰ As mentioned earlier, many revenge porn photographs are accompanied by the victim’s personal information. One study found:

In nearly sixty percent of cases, identifying information about the victim was posted along with the intimate material, including full name (59%); social network information or screenshot . . . (49%); email address (26%); phone number (20%), home address (16%); work address (14%); and social security number (2%).⁵¹

D. Disproportionate Effect on Women

Revenge porn also predominantly affects women. Studies estimate that four out of five victims of revenge porn are women.⁵² Furthermore, because victims are embarrassed or believe this is a private matter, there is an assumption that the victimization rates for revenge porn are low due to underreporting.⁵³ A formerly popular revenge porn website, MyEx.com, shows an estimate of just how disproportionate this effect is. In 2015, the website contained 6,980 total posts of females compared to just 1,390 posts of males.⁵⁴ Young women are especially at risk of being victims of revenge pornography.⁵⁵ It’s not surprising to hear that most adolescents do not feel they can approach adults with questions about sexual activity.⁵⁶ Thus, media and peers end up playing an important part in defining

⁴⁷ See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 241 (2011).

⁴⁸ See *id.*

⁴⁹ See Allison Greene, *The Ill of Misogyny on the Internet: Why Revenge Porn Needs Federal Criminalization*, 16 COLO. TECH. L.J. 175, 177 (2017).

⁵⁰ Talbot, *supra* note 29.

⁵¹ Franks, *supra* note 40, at 1263.

⁵² Poole, *supra* note 2, at 192.

⁵³ See *id.*

⁵⁴ See *id.* at 191–92

⁵⁵ See Kimberly Lawson, *One In 25 Americans Say They’ve Been the Victim of Revenge Porn*, VICE NEWS (Dec. 14, 2016), https://www.vice.com/en_us/article/zmbva9/one-in-25-americans-say-theyve-been-a-victim-of-revenge-porn (“One in 10 women under the age of 30 have experienced threats of nonconsensual image sharing, a much higher rate than either older women or older and younger men.”).

⁵⁶ See Julia R. Lippman & Scott W. Campbell, *Damned If You Do, Damned If You Don’t . . . If You’re a Girl: Relational and Normative Contexts of Adolescent Sexting in the United States*, 8 J. CHILD. & MEDIA 371, 373 (2014).

adolescent attitudes about sexual activity.⁵⁷ Adolescence is also a time of increased independence, which cell phones facilitate by providing adolescents control over their ability to communicate with peers.⁵⁸ As both male and female adolescents struggle to navigate their newfound independence and sexuality, sharing nude images via electronic means, or “sexting,” has become a fairly common practice.⁵⁹ While both male and female youth engage in sexting, females are more likely to experience pressure to do so.⁶⁰ A recent study shows that over two-thirds of young women have been asked for nude photographs.⁶¹ The same study found that less than eight percent of young women sent nude photographs because they wanted to.⁶² Instead, women decide to send the photographs because of threats, desire for status, love, or “to be a good girlfriend.”⁶³ One teen explained, “my boyfriend or someone I really liked asked for them. And I felt like if I didn’t do it, they wouldn’t continue to talk to me.”⁶⁴ Comments such as these came with the acknowledgement that “sometimes pictures get around the whole school.”⁶⁵

II: STATE ATTEMPTS AT REFORM AND ACLU CHALLENGES

A. State Attempts at Reform

The victims’ difficulty obtaining relief, coupled with the extent of the harm, has encouraged many states to take action against revenge porn. For example, Texas tried to criminalize revenge porn, and in 2017, the effort faced a First Amendment challenge. In 2015, the Texas Legislature unanimously passed Texas Penal Code Section 21.16(b), known as the Relationship Privacy Act.⁶⁶ The statute criminalizes intentional disclosures of material depicting another person engaged in sexual conduct without the depicted person’s consent.⁶⁷ The law applies in situations where the depicted person had a reasonable expectation that the material would remain private.⁶⁸ Under the statute, a person could receive a misdemeanor

⁵⁷ *Id.*

⁵⁸ RICH LING, *THE INSIDE TEXT: SOCIAL, CULTURAL AND DESIGN PERSPECTIVES ON SMS* 175 (R. Harper, L. Palen & A. Taylor eds., 2005).

⁵⁹ Amanda Lenhart, *Teens and Sexting*, PEW RES. CTR. (Dec. 15, 2009), <https://www.pewinternet.org/2009/12/15/teens-and-sexting/>.

⁶⁰ See Lippman & Campbell, *supra* note 56, at 371.

⁶¹ Sara E. Thomas, *What Should I Do?: Young Women’s Reported Dilemmas with Nude Photographs*, 15 SEXUAL RES. & SOC. POL’Y 192, 197 (2018).

⁶² *Id.* at 198.

⁶³ *Id.*

⁶⁴ Lippman & Campbell, *supra* note 56, at 380.

⁶⁵ *Id.*

⁶⁶ See Chuck Lindell, *Appeals Court Blocks Texas ‘Revenge Porn’ Law*, STATESMAN (Apr. 20, 2018, 12:01 AM), <https://www.statesman.com/news/20180420/appeals-court-blocks-texas-revenge-porn-law>; Andrea Zelinski, *‘Revenge Porn’ Law Goes Before Top Criminal Court*, HOUS. CHRON. (July 26, 2018), <https://www.houstonchronicle.com/news/politics/texas/article/Revenge-porn-law-goes-before-Texas-top-13105642.php>.

⁶⁷ TEX. PENAL CODE ANN. § 21.16(b) (West 2017).

⁶⁸ *Id.*

penalty of up to one year in jail, a \$4,000 fine, or both.⁶⁹ In 2017, Jordan Bartlett Jones was indicted for unlawful disclosure of intimate visual material under Section 21.16(b).⁷⁰ Jones filed a pretrial application for a writ of habeas corpus and argued that section 21.16(b) was unconstitutional on its face.⁷¹ The trial court denied the application and Jones appealed to the Court of Appeals of Texas.⁷²

On appeal, Jones again stressed that section 21.16(b) is facially overbroad under the First Amendment.⁷³ In addressing Jones' claim, the court first determined that the statute was a content-based regulation on speech because it did not criminalize all intentional disclosures of visual material depicting another person but only those in which the person was engaged in sexual conduct.⁷⁴ Once a regulation is found to be content-based, strict scrutiny is triggered and the government must show a compelling interest and that the law is narrowly tailored to serve that interest.⁷⁵ The court accepted the State's argument that there is a compelling government interest in protecting privacy; however, the court found the statute was not narrowly tailored because it does not require the "disclosing person have knowledge of the circumstances giving rise to the depicted person's privacy expectation."⁷⁶ In addition to finding the statute an invalid content-based restriction, the Court of Appeals of Texas also found it to be overbroad, restricting more speech than necessary and violating the rights of third parties.⁷⁷

In response to the Court of Appeals of Texas striking the statute down as violative of the First Amendment, the Texas Senate revised the language of the statute. On May 19, 2019, the Texas Senate voted unanimously to insert an intent to harm provision into the Relationship Privacy Act.⁷⁸ Texas Representative, Mary Gonzalez said the change is designed to address the concern mentioned by the Court of Appeals of Texas in that the change will protect third parties who "might've accidentally received it and then continued to send it."⁷⁹

In 2016, Rhode Island also attempted to criminalize revenge porn.⁸⁰ The legislature proposed a bill that would criminalize the posting of nude pictures online

⁶⁹ See Emma Platoff, *State Appeals Court Rules Texas' "Revenge Porn" Law Violates the First Amendment*, THE TEX. TRIBUNE (Apr. 19, 2018, 5:00 PM), <https://www.texastribune.org/2018/04/19/appeals-court-strikes-down-texas-revenge-porn-law/>.

⁷⁰ See *Ex Parte Jones*, No.12-17-00346-CR, 2018 WL 2228888, at *1 (Tex. Ct. App. May 16, 2018).

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.* at *4.

⁷⁵ *Id.* at *5; see also George Wright, *Content Neutral and Content Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2083 (2015).

⁷⁶ *Ex Parte Jones*, 2018 WL 2228888, at *7.

⁷⁷ See *id.* at *8.

⁷⁸ See Stephen Young, *Texas Fixes Its Revenge Porn Law*, DALLAS OBSERVER (May 20, 2019, 6:56 AM), <https://www.dallasobserver.com/news/texas-passes-revenge-porn-fix-11668838>.

⁷⁹ *Id.*

⁸⁰ See Emily Davies, *R.I. General Assembly Votes to Criminalize Revenge Porn*, BROWN DAILY HERALD (Apr. 17, 2018), <http://www.browndailyherald.com/2018/04/17/r-general-assembly-votes-criminalize-revenge-porn/>.

without the consent of the person in the photo.⁸¹ The Governor of Rhode Island, Gina Raimondo, vetoed the bill.⁸² In vetoing the bill, the Governor stressed the overbreadth of the statute and the potential harm to media.⁸³ Governor Raimondo explained, “[t]he law could criminalize important acts of political speech, such as the sharing of pictures of abuse from Abu Ghraib, wartime atrocities or humanitarian disasters like famine.”⁸⁴ However, Governor Raimondo indicated she would support a version of the bill requiring proof the perpetrator shared the image with the intent to harm the victim.⁸⁵ Encouraged by the Governor’s conditional approval, Rhode Island legislators tried again. On April 13, 2018, the Rhode Island General Assembly unanimously passed the Electronic Imaging Act.⁸⁶ Similar to the Texas Relationship Privacy Act, Rhode Island’s new bill requires an image to be shared with “intent to harass, intimidate, threaten, or coerce” the victim or “with reckless disregard for the likelihood that the depicted person will suffer harm.”⁸⁷ On June 5, 2018, Governor Raimondo signed the new version of the bill.⁸⁸

Similar to Texas and Rhode Island, Vermont also tried to criminalize revenge porn and faced First Amendment challenges. In 2015, Vermont passed a law making it a crime to “knowingly disclos[e] a visual image of an identifiable person who was nude or was engaged in a sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm.”⁸⁹ Shortly after the Vermont statute was passed, a woman was charged for posting nude pictures of her boyfriend’s ex on Facebook.⁹⁰ The woman filed a motion to dismiss the charges and argued that the Vermont revenge porn statute was unconstitutionally vague.⁹¹ The trial court granted the defendant’s motion to dismiss.⁹² In doing so, the court found the statute was not narrowly tailored to protect the compelling interest of citizen’s privacy and reputational rights.⁹³ Thus, while the trial court acknowledged the State’s interest in protecting citizens’ privacy, the Vermont law suffered from overbreadth, restricting too much constitutionally protected speech.

⁸¹ See Matt O’Brien, *Raimondo Vetoes Revenge Porn Bill Amid Free-Speech Worries*, THE WASH. TIMES (June 21, 2016), <https://www.washingtontimes.com/news/2016/jun/21/rhode-island-governor-vetoes-revenge-porn-bill/>.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ O’Brien, *supra* note 81.

⁸⁵ See Davies, *supra* note 80.

⁸⁶ *Id.*

⁸⁷ 11 R.I GEN. LAWS § 11-64-3 (West 2019).

⁸⁸ See Sarah Doiron, *Gov. Raimondo Signs Revenge Porn, Sextortion Bill into Law*, WPRI.COM (June 5, 2018, 5:06 PM), <https://www.wpri.com/news/gov-raimondo-signs-revenge-porn-sexortion-bill-into-law/>.

⁸⁹ *State v. VanBuren*, No. 1144-12-15Bncr, at 2 (Vt. Superior Ct. Jun. 30, 2016) (granting motion to dismiss) (available at <https://assets.documentcloud.org/documents/2998410/State-v-VanBuren-1144-12-15-Bncr.pdf>).

⁹⁰ See *id.* at 1.

⁹¹ See *id.*

⁹² See *id.* at 5.

⁹³ See *id.* at 3–4.

The State appealed to the Vermont Supreme Court.⁹⁴ On appeal, the State put forth two arguments defending the statute's constitutionality. Primarily, the State argued that nonconsensual pornography constitutes a categorical exclusion to the First Amendment's protection of free speech.⁹⁵ In the alternative, the State asserted the statute passes strict scrutiny analysis in that it is narrowly tailored to further a compelling state interest.⁹⁶

In assessing the State's arguments, the Vermont Supreme Court declined to expand the list of categorical exclusions to include nonconsensual pornography.⁹⁷ The Vermont Supreme Court based its decision on the continued hesitation of the United States Supreme Court to add new categories of speech to the list of categorical exclusions.⁹⁸ Despite rejecting the State's first argument, the Vermont Supreme Court held that the statute passes strict scrutiny analysis.⁹⁹ The Vermont Supreme Court held that the State asserted a compelling interest; the court stated "[t]he government interest in preventing any intrusions on individual privacy is substantial; it's at its highest when the invasion of privacy takes the form of nonconsensual pornography."¹⁰⁰ Furthermore, the Vermont Supreme Court found the statute to be narrowly tailored to affect the State's purported interest.¹⁰¹ In support of this conclusion, the Vermont Supreme Court pointed to the statute's precise definitions and exceptions for disclosures made in the public interest.¹⁰² Thus, after protracted litigation, Vermont's attempt at criminalizing revenge porn seems to have survived.

⁹⁴ See *State v. VanBuren*, 214 A.3d 791, 798 (Vt. 2019).

⁹⁵ See *id.* at 799. Categorical exclusions refer to expressions that have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Expressions that are categorically excluded from First Amendment protection are those that are likely to incite violence, such as child pornography, true threats, and obscenity. See *New York v. Ferber*, 458 U.S. 747, 763 (1982) ("When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is so clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy or the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Black*, 538 U.S. at 344 ("[T]he First Amendment permits a State to ban 'true threats.'"); *Roth v. United States*, 354 U.S. 476, 485 (1957) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene.").

⁹⁶ See *VanBuren*, 214 A.3d at 799.

⁹⁷ See *id.* at 807.

⁹⁸ See *id.* In particular, the Vermont Supreme Court mentioned the recent United States Supreme Court cases of *United States v. Stevens*, *Brown v. Entertainment Merchants Association*, and *United States v. Alvarez*. In *Stevens*, the United States Supreme Court declined to add animal cruelty to the list of categorical exclusions. See 599 U.S. 460, 468 (2010). Similarly, in *Brown*, the United States Supreme Court refused to add violent video games sold to minors to the list of categorical exclusions. See 564 U.S. 786, 792 (2011). Most recently, in *Alvarez*, false speech was rejected as a categorical exclusion. See 567 U.S. 709, 722 (2012).

⁹⁹ See *VanBuren*, 214 A.3d at 808.

¹⁰⁰ *Id.* at 811.

¹⁰¹ See *id.* at 812.

¹⁰² See *id.* at 813.

B. ACLU Challenges on First Amendment Grounds

Since states began attempting to criminalize revenge porn, the ACLU has been heavily involved. Back in 2014, the Arizona legislature unanimously passed a bill making it unlawful to “intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific activities if the person knows or should have known that the depicted person has not consented to the disclosure.”¹⁰³ On September 23, 2014, the ACLU filed a lawsuit, seeking declaratory and injunctive relief against the enforcement of the bill on the behalf of a group of bookstore owners, newspapers, publishers, librarians, photographers, and free-speech organizations.¹⁰⁴ In response to the ACLU, the plaintiffs argued that these groups show nude and sexual images containing artistic, cultural, and newsworthy value without seeking the permission of the people in the material before showing it.¹⁰⁵ Under the Arizona law they argued, the groups would be subject to felony prosecution.¹⁰⁶ In the plaintiff’s complaint, the ACLU conceded that the State does have a legitimate interest in addressing the harms of revenge porn.¹⁰⁷ However, the ACLU reasoned that the law is not designed to combat the issues revenge porn causes, the law is unconstitutionally vague, and the law suffers from overbreadth.¹⁰⁸

The ACLU’s first issue with the Arizona law was that the law was not narrowly tailored to serve the interests revenge porn raises.¹⁰⁹ Concerns centered around the lack of a requirement of wrongful intent in the law.¹¹⁰ The ACLU worried that if there was not a wrongful intent requirement then those sharing the photo for purposes other than revenge could be penalized. The complaint then offered the example of “a woman who received an unsolicited photograph of a man’s penis could be convicted of a felony if, alarmed by the communication, she shared the photograph with a friend.”¹¹¹ The ACLU also claimed that if the interest was preventing the harms caused by revenge porn, the law made no distinction between material that causes harm and material that does not.¹¹² Since revenge porn is centered around the idea that the person had no intention for the sexually explicit

¹⁰³ Act of Apr. 30, 2014, ch. 268, sec. 1, 2014 Ariz. Sess. Laws 2505, 2505–06 (2014) (codified as amended at ARIZ. REV. STAT. § 13-3601 (2014)).

¹⁰⁴ See Amanda Levendowski, *Arizona’s Revenge Porn Law Isn’t a Solution—It’s a Different Kind of Problem*, VICE NEWS (Sept. 29, 2014), https://news.vice.com/en_us/article/qvaa5b/arizonas-revenge-porn-law-isnt-a-solution-its-a-different-kind-of-problem.

¹⁰⁵ Complaint at 5, *Antigone Books v. Horne*, No. 2:14-cv-02100-PHX-SRB (D. Ariz. July 10, 2015), <https://www.aclu.org/legal-document/antigone-books-v-horne-complaint>.

¹⁰⁶ See *id.* at 2.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 20.

¹¹¹ Complaint at 20, *Antigone Books v. Horne*, No. 2:14-cv-02100-PHX-SRB (D. Ariz. July 10, 2015), <https://www.aclu.org/legal-document/antigone-books-v-horne-complaint>.

¹¹² See *id.* at 21.

material to be shared, the law raised concerns because it made “no distinction between images in which the person or persons pictured had a reasonable expectation of privacy and those in which they do not.”¹¹³ In addition, the ACLU contends that the law is not narrowly tailored because it applies even when the person in the picture is not recognizable.¹¹⁴

The ACLU also claimed the law suffered from overbreadth.¹¹⁵ The primary reason for this was because the law made no carve-outs for artistic material or material related to public concern.¹¹⁶ In this section of the complaint, the ACLU makes several grandiose claims about hypothetical convictions. For example, the complaint cites¹¹⁷ many historical images such as the “Napalm Girl,”¹¹⁸ the Abu Ghraib photographs,¹¹⁹ and *Edward Weston: 125 Photographs*.¹²⁰ In an attempt to show the absurdity of the statute the ACLU states, “as long as you have this uncertainty . . . you run the risk of an overzealous prosecutor using this to make a point against a reporter or someone else who circulates these images.”¹²¹ However, others argue that revenge porn does not encourage the discussion of cultural, religious, or political issues.¹²² By this logic, criminalizing the sharing of revenge porn has little effect on a poster’s expression of ideas.¹²³

Finally, the ACLU also stressed the vagueness of the statute. For example, the terms “disclose, display, distribute, publish, advertise, and offer . . . could be construed widely to include merely recommending a restricted image or ‘linking to’ the image online.”¹²⁴ The ACLU also claimed that the statute’s use of the term “state of nudity” was too expansive and vague.¹²⁵ This, the ACLU claimed, would lead to a chilling effect on speech as “booksellers and librarians will have to spend countless hours looking over books, magazines, and newspapers to determine if a

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 4.

¹¹⁶ *Id.* at 21.

¹¹⁷ Complaint at 21, *Antigone Books v. Horne*, No. 2:14-cv-02100-PHX-SRB (D. Ariz. July 10, 2015), <https://www.aclu.org/legal-document/antigone-books-v-horne-complaint>.

¹¹⁸ “Napalm Girl” is a photograph of a naked nine-year-old girl fleeing from a Napalm bombing during the Vietnam War. See Hillary Leung, ‘Napalm Girl’ In Iconic Vietnam War Photo Wins German Prize for Peace Work, *TIME* (Feb. 12, 2019), <https://time.com/5527355/napalm-girl-kim-phuc-phan-thi-dresden-prize/>.

¹¹⁹ The Abu Ghraib photographs are a series of photos that depict abuse of Iraqi detainees by American soldiers during the Iraq war. Several of the photographs involved nudity. See Seymour M. Hersh, *Torture at Abu Ghraib*, *THE NEW YORKER* (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

¹²⁰ *Edward Weston: 125 Photographs* is a collection of work from the icon American photographer, Edward Weston. Weston was most famous for his close-ups and nudes. See *Biography*, EDWARD WESTON, <https://edward-weston.com/edward-weston/> (last visited Aug. 18, 2019).

¹²¹ Tracy Clark-Flory, *Bill That Would Make Revenge Porn Federal Crime to Be Introduced*, *VOCATIV* (July 14, 2016, 10:25 AM), <https://www.vocativ.com/339362/federal-revenge-porn-bill/index.html>.

¹²² See, e.g., SOLOVE & SCHWARTZ, *supra* note 20, at 162.

¹²³ *Id.*

¹²⁴ Complaint at 22, *Antigone Books v. Horne*, No. 2:14-cv-02100-PHX-SRB (D. Ariz. July 10, 2015), (available at <https://www.aclu.org/legal-document/antigone-books-v-horne-complaint>).

¹²⁵ *Id.*

nude picture was distributed with consent.”¹²⁶ Many store owners will simply decline to carry any materials containing nude images to avoid the risk of going to prison.¹²⁷ With these criticisms in mind, the ACLU filed a motion for declaratory and injunctive relief.¹²⁸ On July 10, 2015, the United States District Court for the District of Arizona permanently ruled against the enforcement of the law.¹²⁹ The ACLU touted this as an “important vindication of the First Amendment.”¹³⁰

The ACLU continued its opposition to revenge porn laws in Rhode Island. As mentioned earlier, Rhode Island attempted to criminalize revenge porn in 2016, but the bill was ultimately vetoed by Governor Raimondo.¹³¹ After the Governor vetoed the bill, the ACLU issued a statement that “commend[s] the Governor for recognizing the serious First Amendment concerns raised by this legislation, and for the need to enact a more carefully crafted law that will pass constitutional muster.”¹³² The statement is interesting in light of the additional safeguards the Rhode Island bill contained, compared to the Arizona law. The Rhode Island bill contained a carve-out for images that were in the public interest.¹³³ This would seemingly take care of the ACLU concerns in the Arizona bill that sharing images such as the “Napalm Girl” could lead to penalization. However, even this carve-out for public interest was not enough for the ACLU because the final determination of what constitutes public interest would be left to the jury.¹³⁴ By leaving the determination to the jury, publishers would have no true ability to assess in advance if the image could result in criminal punishment.¹³⁵ Even after Rhode Island lawmakers modified the bill in 2018, the ACLU continued to have reservations. In response to the updated bill, Steven Brown, Executive Director of the Rhode Island chapter of the ACLU stated, “the language of the legislation does not articulate well enough that there must be an ‘intent to harm an individual.’ Without more specific language, a teenager sharing hacked photos of a celebrity with a friend would qualify as a criminal.” Making grandiose claims about hypothetical convictions seems to be a common tactic by the ACLU, as similar arguments were put forth in opposition to the Arizona law.

¹²⁶ *Bookstores, Publishers, News Media, Librarians, and Photographers Charge Law Violates Freedom of Speech*, ACLU (Sept. 23, 2014), <https://www.aclu.org/press-releases/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images>.

¹²⁷ *See id.* at 29.

¹²⁸ *Id.* at 1.

¹²⁹ *See* David Horowitz, Stacy Sullivan & Steve Kilar, *Judge Halts Enforcement of Unconstitutional Nude Photo Law in Arizona*, ACLU (July 10, 2015), <https://www.aclu.org/news/judge-halts-enforcement-unconstitutional-nude-photo-law-arizona>.

¹³⁰ *Id.*

¹³¹ *See supra*, text accompanying notes 80–88.

¹³² *Free Speech and Media Groups Applaud Governor's Veto of Overbroad "Revenge Porn" Bill*, ACLU, (Jun. 21, 2016), <https://www.aclu.org/news/free-speech-and-media-groups-applaud-governors-veto-overbroad-revenge-porn-bill>.

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

III: FEDERAL LEGISLATION

A. The Intimate Privacy Protection Act and The ENOUGH Act

Representative Jackie Speier introduced federal legislation in July of 2016. This legislation was called the Intimate Privacy Protection Act of 2016 (IPPA).¹³⁶ In announcing the bill, Representative Speier stated, “[w]hat makes [revenge porn] even more despicable is that many predators have gleefully acknowledged that the vast majority of their victims have no way to fight back My bill will fix that appalling legal failure.”¹³⁷ The IPPA would make it unlawful to

knowingly use[] the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of the person, with reckless disregard for the person’s lack of consent to the distribution.¹³⁸

Learning from earlier efforts by states attempting to pass revenge porn laws, this bill contains several exceptions to help it pass constitutional demands. There are four exceptions under the IPPA. First, it allows the use of images for law enforcement purposes and for legal proceedings.¹³⁹ Second, it allows for distribution of images if the images are taken voluntarily or if the voluntary engagement in sexual activity takes place in a public or commercial setting.¹⁴⁰ Third, it makes an exception for any material that is in the bona fide public interest.¹⁴¹ Finally, it holds website owners liable only if the website intentionally promotes or solicits content that it knows to be in violation of this section.¹⁴² The bill actually garnered a fair amount of support with six co-sponsors—four Republicans and two Democrats.¹⁴³ The bill was the result of substantial coordination with various groups, including

¹³⁶ See *Rep Speier and Sens Harris, Burr, and Klobuchar Introduce Bipartisan Bill to Address Online Exploitation of Private Images*, CONGRESSWOMAN JACKIE SPEIER (Nov. 28, 2017), <https://speier.house.gov/media-center/press-releases/rep-speier-and-sens-harris-burr-and-klobuchar-introduce-bipartisan-bill>.

¹³⁷ Mary Anne Franks, *It’s Time for Congress to Protect Intimate Privacy*, HUFFINGTON POST (July 18, 2016, 1:32 PM), https://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act_b_11034998.html.

¹³⁸ Intimate Privacy Protection Act, H.R. 5896, 114th Cong. § 1802(a) (2016).

¹³⁹ *Id.* at § 1802(b)(1)(A)-(C).

¹⁴⁰ *Id.* at § 1802(b)(2).

¹⁴¹ *Id.* at § 1802(b)(3).

¹⁴² *Id.* at § 1802(b)(4).

¹⁴³ See Jesse Rifkin, *Revenge Porn Is a Growing and Dangerous Issue. This Bill Would Make It a Federal Crime*, GOVTRACK (Sept. 14, 2016), <https://govtrackinsider.com/revenge-porn-is-a-growing-and-dangerous-issue-this-bill-would-make-it-a-federal-crime-e8699f2033d4>.

technology companies such as Facebook and Twitter.¹⁴⁴ The bill was referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.¹⁴⁵ The IPPA has sat in committee now for over two years without ever receiving a vote.¹⁴⁶

Critics claimed the bill “reach[ed] stuff that’s not actually the problem.”¹⁴⁷ The concern is that free speech will be chilled as websites take down content or that people will not post content because they are afraid of prosecution.¹⁴⁸ People worry that the bill means “prison sentences for anyone who shares baby pictures, publishes photographs of war crimes, or forwards photographic proof of politicians’ sexual impropriety.”¹⁴⁹ Supporters of the criminalization of revenge porn have pushed back against the slippery slope argument put forth by opponents. Danielle Keats Citron, a professor at the Boston University School of Law and a MacArthur Fellowship recipient, states, “the sharing of nude images among intimates would inhibit a negligible amount of expression that the public legitimately cares about, and it would foster private expression.”¹⁵⁰ Instead, Citron argues that the nonconsensual disclosure of a person’s nude image will actually chill private speech.¹⁵¹ If a person is continually afraid that their picture could be shared without consequence, they will be less inclined to engage in communications of a sexual nature.¹⁵² This could negatively impact couples as both their intimacy and their willingness to be forthright in other relationship aspects could decrease.¹⁵³ Supporters of the criminalization of revenge porn also claim that revenge porn laws do not seem to be producing results that are inconsistent with their purpose. There is no evidence that in criminal courts these laws are “producing questionable guilty verdicts or egregious sentences.”¹⁵⁴ The ACLU has not been able to point to a single case of revenge porn laws being overzealously applied.¹⁵⁵

Despite these setbacks, Representative Speier has not given up. In November 2017, Representative Speier, along with Senator Kamala Harris, introduced the

¹⁴⁴ See Franks, *supra* note 137.

¹⁴⁵ See Rifkin, *supra* note 143.

¹⁴⁶ See H.R. 5896 (114th): *Intimate Privacy Protection Act of 2016*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr5896/summary> (last updated Sept. 16, 2016) (summarizing IPAA’s legislative history).

¹⁴⁷ See Steven Nelson, *Lawmakers Unveil Proposal to Take Nip Out of Revenge Porn*, U.S. NEWS (July 14, 2016, 2:07 PM), <https://www.usnews.com/news/articles/2016-07-14/lawmakers-lay-bare-proposal-to-take-nip-out-of-revenge-porn>.

¹⁴⁸ See *id.*

¹⁴⁹ *Congresswoman Jackie Speier Introduces Federal Bill Against NCP*, CYBER C. R. INITIATIVE (July 18, 2016), <https://www.cybercivilrights.org/fed-bill-intro/>.

¹⁵⁰ DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 2010 (2014).

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.

¹⁵⁵ Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV., 1251, 1130 (2017).

ENOUGH Act. The new act attempts to address some of the problems with the IPPA. In addressing these concerns Representative Speier stated, “[b]ecause a photograph is a form of speech, the ENOUGH Act includes a number of civil liberties safeguards to ensure that only nonconsensual sharers would be liable.”¹⁵⁶ The language of the ENOUGH Act is essentially the same as the IPPA.¹⁵⁷ However, under this updated bill

it shall be unlawful to . . . distribute an intimate visual depiction of an individual . . . with knowledge of or reckless disregard for . . . the reasonable expectation of the individual that the depiction would remain private and harm that the distribution could cause to the individual.¹⁵⁸

Therefore, the ENOUGH Act attempts to address two of the concerns raised by opponents to the IPPA. First, it requires the media to be created with an expectation of privacy. Second, it includes language that the distributor has knowledge of or reckless disregard for harm that the distribution could cause. This would eliminate the chance that the law sweeps in people who are not the problem.

Also, to fully vet the First Amendment concerns surrounding this bill, the drafters consulted constitutional scholars.¹⁵⁹ For example, Erwin Chemerinsky, the Dean of Berkley Law and a nationally distinguished scholar on constitutional law, was consulted in drafting the statute.¹⁶⁰ Chemerinsky and other constitutional scholars such as Washington University School of Law Professor Neil Richards,¹⁶¹ have voiced support for ENOUGH and have stated that it does not violate free speech. Richards assured lawmakers, “[l]imited protection for confidential nude photos bears no threat to our broad constitutional protections for free speech.”¹⁶²

B. ACLU Opposition to the ENOUGH Act

In addition to opposing state attempts to criminalize revenge porn, the ACLU has also been adamantly against federal legislation. Yet this opposition comes despite an acknowledgment of the psychological and reputational damage revenge porn creates. A lawyer for the ACLU stated, “there are many places where public

¹⁵⁶ *The ENOUGH ACT of 2017-Nonconsensual Online User Graphic Harassment*, SPEIER, HOUSE. GOV. <https://speier.house.gov/sites/speier.house.gov/files/The%20ENOUGH%20Act%20One%20Pager%2011-27-17%20%28002%29.pdf> (last visited Nov. 5, 2018).

¹⁵⁷ See Ending Nonconsensual Online User Graphic Harassment Act of 2017, S. 2162, 115th Cong. (2017).

¹⁵⁸ Ending Nonconsensual Online User Graphic Harassment Act of 2017, S. 2162, 115th Cong. § 1802(b)(1)(A)-(C) (2017).

¹⁵⁹ See *id.*

¹⁶⁰ *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, CYBER C. R. INITIATIVE (Oct. 6, 2017), <https://www.cybercivilrights.org/2017-cybercrime-symposium/>.

¹⁶¹ See *id.*; Tracy Clark-Flory, *Bill That Would Make Revenge Porn Federal Crime to be Introduced*, VOCATIV (July 14, 2016, 10:25 AM), <https://www.vocativ.com/339362/federal-revenge-porn-bill/index.html>.

¹⁶² Neil M. Richards & Danielle Citron, *Regulating Revenge Porn Isn't Censorship*, ALJAZEERA AM. (Feb. 11, 2015), <http://america.aljazeera.com/opinions/2015/2/why-regulating-revenge-porn-isnt-censorship.html>.

interest outweighs the harm done.”¹⁶³ By this argument, the ACLU is arguing that women should bear the costs of revenge porn in order to make sure that one of the impractical hypotheticals of someone sharing an image of the “Napalm Girl” does not end up prosecuted.

The ACLU’s criticisms of federal legislation mirror those brought up in the opposition to numerous state laws. First, the ACLU points to existing remedies as a viable option for victims.¹⁶⁴ Furthermore, the ACLU turns toward the fact that several websites have agreed to cooperate in order to stop revenge porn.¹⁶⁵ The popular website Reddit agreed to ban nude or sexually explicit material posted without the subject’s consent. Reddit’s policy reads, “[i]f you believe that someone has submitted without your permission, to Reddit a link to a photograph, video, or digital image of you in a state of nudity or engaged in any act of sexual conduct, please contact us and we will expedite its removal as quickly as possible.”¹⁶⁶ Twitter has vowed to lock out users who post content of intimate material distributed without consent.¹⁶⁷ Facebook has also taken action by instructing its employees to remove intimate material shared without consent for the purposes of revenge.¹⁶⁸ Large search engines, such as Google, Bing, and Yahoo have also enacted new policies to help combat revenge porn. However, most search engines will not remove the photograph completely. Instead, the search engines “‘de-index’ revenge porn, so that it no longer comes up under searches of the depicted person’s name, though it can still be accessed by the URL.”¹⁶⁹ Even Pornhub, arguably the world’s most trafficked pornography site,¹⁷⁰ has honored requests to take down revenge porn by email since its founding.¹⁷¹ Pornhub reinforced its stance to do so in 2015 by adding a page on its website that allows people to report revenge porn in order to streamline the reporting process.¹⁷² However, supporters of revenge porn legislation argue that while it is significant that many websites have agreed to take down

¹⁶³ Peter Rugg, *An ACLU Lawyer’s Free-Speech Argument Against Federal Revenge Porn Laws*, INVERSE (Aug. 17, 2015), <https://www.inverse.com/article/5379-an-aclu-lawyer-s-free-speech-argument-against-federal-revenge-porn-laws>.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ Andrea Peterson, *Reddit Is Finally Cracking Down on Revenge Porn*, THE WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/02/24/reddit-is-finally-cracking-down-on-revenge-porn/?noredirect=on&utm_term=.f2e986284a5b.

¹⁶⁷ *See* Colin Daileida, *Social Media Sites May be Better Than the Law at Blocking Revenge Porn*, MASHABLE (Mar. 18, 2015), <https://mashable.com/2015/03/18/banning-revenge-porn/#ZjzjNKL9yuq3>.

¹⁶⁸ *See id.*

¹⁶⁹ Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.

¹⁷⁰ *See The World’s Most Popular Websites*, STATISTA: INTERNET (Nov. 25, 2019), <https://www.statista.com/chart/17613/most-popular-websites/>.

¹⁷¹ *See* Amar Toor, *Pornhub Makes It Easier to Report Revenge Porn*, THE VERGE (Oct. 13, 2015, 10:00 AM), <https://www.theverge.com/2015/10/13/9518029/pornhub-revenge-porn-reporting-page>.

¹⁷² *See id.*

revenge porn, this is an after-the-fact procedure and the focus needs to be on preemptive measures.¹⁷³

Primarily, the ACLU argues the ENOUGH Act is too broad. This is an argument that the ACLU has consistently asserted in state revenge porn legislation and the IPPA. First, the ACLU argues, there is still a need for a malice standard. Michael W. Macleod-Ball, a First Amendment lawyer at the ACLU, stated, “[t]here is still no intent standard. People who have innocent photos or depictions, it still subjects them to criminalization of their protected free speech activities.”¹⁷⁴ The organization is worried about the fact that people other than the original uploader of the image can be punished if there is no intent requirement.¹⁷⁵ This concern prevails despite the provision protecting websites from liability from content published by third parties unless they are soliciting or should know the content is in violation of the act.

C. Inconsistencies with the ACLU’s Stance on Revenge Porn

i. Intent Requirement

Several constitutional scholars, including Dean of Berkley Law, Erwin Chemerinsky, and Professor at University of Miami School of Law, Mary Anne Franks, have questioned the ACLU’s opposition to this bill as inconsistent with the First Amendment. Chemerinsky stated that “criminal laws against non-consensual pornography are ‘one of the rare instances where I’m on the opposite side of the ACLU.’”¹⁷⁶ Part of this inconsistency surrounds the ACLU’s demand for a malice standard. Both Chemerinsky and Franks have urged that there is no constitutional basis for claiming that privacy laws must include a requirement of a standard of intent to cause harm to the victim in order to pass First Amendment muster.¹⁷⁷ In fact, Professor Franks argues that instead of making a law more consistent with the First Amendment, malice standards create two constitutional vulnerabilities: under-inclusiveness and viewpoint discrimination.¹⁷⁸

The inclusion of a malice standard makes revenge porn laws susceptible to objections of under-inclusiveness.¹⁷⁹ Revenge porn laws need to be narrowly tailored in order to survive the strict scrutiny implications of a First Amendment challenge. Yet, laws can fail for being too narrow.¹⁸⁰ “[W]hen a law targets some conduct or actors for adverse treatment, yet leaves untouched conduct or actors that are

¹⁷³ See *id.*

¹⁷⁴ Tracy Clark-Flory, *Bill That Would Make Revenge Porn Federal Crime to Be Introduced*, VOCATIV (July 14, 2016, 10:25 AM), <https://www.vocativ.com/339362/federal-revenge-porn-bill/index.html>.

¹⁷⁵ See *id.*

¹⁷⁶ See CYBER C.R., *supra* note 160.

¹⁷⁷ Mary Anne Franks, “*Revenge Porn*” *Reform: A View from the Front Lines*, 69 FLA. L. REV., 1251, 1287 (2017); see also CYBER C.R., *supra* note 160.

¹⁷⁸ See Franks, *supra* note 177, at 1287.

¹⁷⁹ *Id.*

¹⁸⁰ See William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L. REV. 637, 637 (1993).

indistinguishable in terms of the law's purpose" is an important consideration in First Amendment challenges.¹⁸¹ Requiring a malice standard in revenge porn laws does exactly this by leaving actors who share nude photographs for purposes such as comedy or monetary gain free from punishment. Professor Franks presents an example of the Kappa Delta Rho fraternity at Penn State University.¹⁸² Here, it was discovered that fraternity members were sharing nude photographs of unconscious women in a group message.¹⁸³ When asked about the group, a fraternity member responded, "[i]t was a satirical group. It wasn't malicious whatsoever. It wasn't intended to hurt anyone. It wasn't intended to demean anyone."¹⁸⁴ Unfortunately, groups such as these are not uncommon. For example, in 2017, an investigation revealed that members of the United States Marine Corps had been sharing nude photographs of female Marines on a Facebook page.¹⁸⁵ Situations like this, or situations where the person shares a photograph for pecuniary gain,¹⁸⁶ would be excluded from liability if the statute required an intent to harm standard.

In addition, the inclusion of a malice standard makes revenge porn laws susceptible to objections of viewpoint discrimination.¹⁸⁷ Viewpoint discrimination occurs when the law has the effect of suppressing a particular point of view. Viewpoint discrimination is especially at odds with the First Amendment: "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."¹⁸⁸ By requiring an intent to harm standard, the asserted viewpoint the law is aiming to combat is stopping the use of images to enforce negative views about women and their sexuality.¹⁸⁹ Whereas, a law that does not specify a malice standard focuses on the governmental purpose of protecting privacy and is "uninterested in viewpoint."¹⁹⁰

Professor Franks has also called attention to the fact that the ACLU has previously argued that a malice standard is unconstitutional in the context of the Violence Against Women Act.¹⁹¹ In that situation, the ACLU objected to federal stalking provisions that require an intent to cause substantial emotional distress or

¹⁸¹ *Id.*

¹⁸² See Franks, *supra* note 137.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Chris Perez, *Marines Shared Photos of Naked Female Recruits on Secret Facebook Page*, N.Y. POST (Mar. 5, 2017), <https://nypost.com/2017/03/05/marines-shared-photos-of-naked-female-recruits-on-secret-facebook-page-report/>.

¹⁸⁶ See *infra* Part C, Section 3.

¹⁸⁷ See Franks, *supra* note 177, at 1289–90.

¹⁸⁸ *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

¹⁸⁹ See Franks, *supra* note 177, at 1323–24.

¹⁹⁰ See *id.*

¹⁹¹ Sarah E. Driscoll, Comment, *Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech*, 21 ROGER WILLIAMS U.L. REV. 75, 110 (2016).

intent to harass or intimidate because it would be overbroad.¹⁹² Professor Franks argues that it is “strange . . . the ACLU maintains that such language is unconstitutional in the context of stalking laws while insisting that such language is necessary to ensure the constitutionality of nonconsensual pornography laws.”¹⁹³

ii. Other Privacy Areas

There are other inconsistencies with the ACLU’s opinion in relation to other forms of private information. For example, Professor Mary Anne Franks points to the ACLU’s position on consent as it relates to the use of patient medical records.¹⁹⁴ In 2008, the Protecting Records, Optimizing Treatment, and Easing Communication through Healthcare Technology Act of 2008 (Pro(Tech)T) was introduced.¹⁹⁵ Pro(Tech)T promotes the use of electronic health records and establishes a national coordinator for health information technology to develop an infrastructure that permits the electronic exchange of health information.¹⁹⁶ The bill also establishes incentives for health care providers and insurance companies to share health information electronically across the country.¹⁹⁷ In response to this bill, the ACLU reached out to the House Energy and Commerce Committee to stress the lack of privacy provisions.¹⁹⁸ Of most concern to the ACLU were companies that may want to use patient records for purposes not involving treatment or payment.¹⁹⁹ In these cases, the ACLU called for the bill to require a patient consent provision.²⁰⁰ The approach to consent in this case vastly differs from those in revenge porn cases where the possible implications are much broader. Asking for patient consent in the context of medical records may prevent insurance companies from denying coverage since they are denied access to your medical records.²⁰¹ Asking a person for consent in the context of a sexually explicit photo has the ability to prevent the material from forever circulating on the internet. It is unclear why a person should be able to stop their medical files from being shared but not be able to stop a sexually explicit or nude photograph of them from being shared.

¹⁹² Gabe Rottman, *New Expansion of Stalking Law Poses First Amendment Concerns*, ACLU (Mar. 12, 2013), <https://www.aclu.org/blog/free-speech/new-expansion-stalking-law-poses-first-amendment-concerns>.

¹⁹³ Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, ELSEVIER (Aug. 17, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823.

¹⁹⁴ See Franks, *supra* note 137.

¹⁹⁵ *Medical Privacy and Electronic Records*, ACLU, <https://www.aclu.org/other/medical-privacy-and-electronic-records> (last visited Nov. 14, 2019).

¹⁹⁶ See Protecting Records, Optimizing Treatment, and Easing Communication Through Healthcare Technology Act of 2008, H.R. 6357, 100th Cong. (2008).

¹⁹⁷ Jane Jerrard, *Pay-for-Reporting is Here to Stay*, THE HOSPITALIST, <https://www.the-hospitalist.org/hospitalist/article/123623/pay-reporting-here-stay> (last visited Oct. 19, 2019).

¹⁹⁸ *ACLU Urges Congress to Define Medical Privacy as Patient Control of Electronic Health Records*, ACLU (July 23, 2008), <https://www.aclu.org/news/aclu-urges-congress-define-medical-privacy-patient-control-electronic-health-records?redirect=technology-and-liberty/aclu-urges-congress-define-medical-privacy-patient-control-electronic-health->.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.*

Professor Franks also points to the ACLU's protection of genetic information to show inconsistencies in the treatment of private information.²⁰² In 2008, Congress passed the Genetic Information Nondiscrimination Act, which prevents health care providers, employers, and insurance companies from denying a person based on their genetic makeup.²⁰³ The ACLU wrote a letter to the Senate urging them to support this Act.²⁰⁴ In doing so the ACLU classified genetic makeup as "extremely sensitive personal information."²⁰⁵ However, in the context of revenge porn, the ACLU classifies it not as a privacy issue but as a harassment issue.²⁰⁶ Professor Franks explains that "treating nonconsensual pornography as a harassment issue instead of a privacy issue demotes the harm it causes from an invasion of privacy to something more akin to hurt feelings. . . . This [is] a misguided and patronizing approach"²⁰⁷ The ACLU's approach views a person's genetic makeup being shared to medical and insurance companies without his or her consent as an invasion of privacy. Yet in the organization's estimation, a sexually explicit photograph of a clearly identifiable person shared on the internet without his or her consent is only harassment and not a privacy issue. This ignores the fact that most of these sexually explicit photographs were taken with the assumption that the image would remain private. It is unclear why use of an individual's genetic information brings up privacy concerns but the use of an individual's intimate and sexual photograph by thousands of websites does not.

In other privacy contexts, motives such as pecuniary gain have been enough to limit the sharing of information.²⁰⁸ For example, a growing concern has been what to do about data brokers. "Data brokers are entities that collect information about consumers[] and then sell" the information.²⁰⁹ The ACLU has called on the Federal Trade Commission to target data brokers.²¹⁰ The result of these data brokers, the ACLU says, is that "consumers are treated like products to be bought and sold."²¹¹ The ACLU is not calling for data brokers to have an intent to harm consumers, it is enough that the data brokers are using the consumers for

²⁰² See generally Franks, *supra* note 137.

²⁰³ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008).

²⁰⁴ *ACLU Letter to the Senate Urging Support of S. 358, the "Genetic Information Nondiscrimination Act of 2007,"* ACLU, <https://www.aclu.org/letter/aclu-letter-senate-urging-support-s-358-genetic-information-nondiscrimination-act-2007?redirect=technology-and-liberty/aclu-letter-senate-urging-support-s-358-genetic-information-nondiscriminatio> (last visited Oct. 19, 2018).

²⁰⁵ *Id.*

²⁰⁶ See Franks, *supra* note 177, at 1327.

²⁰⁷ *Id.* at 1333.

²⁰⁸ See Franks, *supra* note 137.

²⁰⁹ Yael Grauer, *What Are 'Data Brokers,' and Why Are They Scooping Up Information About You?*, MOTHERBOARD (Mar. 27, 2018, 10:00 AM), https://motherboard.vice.com/en_us/article/bjpx3w/what-are-data-brokers-and-how-to-stop-my-private-data-collection.

²¹⁰ See Letter from Laura W. Murphy, Dir., ACLU Wash. Leg. Off. & Rachel Goodman, Staff Att'y, to Edith Ramirez, Chairwoman, FTC (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_ftc_comment.pdf; see also Franks, *supra* note 177, at 1333.

²¹¹ Chris Calabrese, *Federal Trade Commission Needs to Move Beyond Reports When It Comes to Data Brokers*, ACLU (May 28, 2014, 3:10 PM), <https://www.aclu.org/blog/national-security/federal-trade-commission-needs-move-beyond-reports-when-it-comes-data-brokers>.

pecuniary gain. The same issue is occurring in the marketplace for revenge porn. Websites use the images for pecuniary gain in the form of extortion or advertising. It is unclear why the context of data brokers pecuniary gain is a sufficient justification for the ACLU but then in the context of revenge porn a further justification is required. This discrepancy is even harder to understand when revenge porn has evolved into a marketplace, far surpassing the traditional jilted ex-lover explanation. Requiring an “intent to harm” would exclude people from liability if they posted material to make a profit. This would make appalling statements like the one from Hunter Moore, founder of IsAnyoneUP.com,²¹² perfectly fine under the law because he directly stated his intent was financially based. Despite the perpetrator’s intent of pecuniary gain, the victim still experiences harm. Therefore, some claim that other motives “should be just as objectionable as to cause harm to the victim.”²¹³

iii. Women’s Rights

Throughout history, the ACLU has been a strong supporter of women’s rights. Since the 1920s, the ACLU has been “vigilant in its defense of women’s rights.”²¹⁴ During the 1930s and 1940s, the ACLU fought for equal pay.²¹⁵ Throughout the 1960s, the ACLU encouraged and advocated for laws barring discrimination against women.²¹⁶ In the 1970s, the ACLU fought to protect the right of reproductive choice.²¹⁷ Retrospectively, the ACLU describes itself as “prematurely feminist.”²¹⁸ Today, the ACLU Women’s Rights Project’s goal is to “push[] for change and systematic reform in institutions that perpetuate discrimination against women, focusing its work in the areas of employment, violence against women, and education.”²¹⁹

Also concerned with the perpetuation of discrimination against women, the 1980s saw the evolution of anti-porn feminists. Anti-porn feminists put forth the argument that pornography creates a system of pervasive injustice against women.²²⁰ While some anti-porn feminists are against pornography in all forms and genres, most are opposed to inegalitarian pornography.²²¹ Inegalitarian pornography is defined as “sexually explicit representations that as a whole

²¹² See *supra* text accompanying note 16.

²¹³ See CYBER C.R., *supra* note 160.

²¹⁴ *The ACLU and Women’s Rights: Proud History, Continuing Struggle*, ACLU, <https://www.aclu.org/other/aclu-and-womens-rights-proud-history-continuing-struggle> (last visited Nov. 7, 2018).

²¹⁵ See *id.*

²¹⁶ *Id.*

²¹⁷ See *id.*

²¹⁸ *Id.*

²¹⁹ *Women’s Rights*, ACLU, <https://www.aclu.org/issues/womens-rights> (last visited Nov. 7, 2018).

²²⁰ See generally Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN’S L.J. 1 (1985); see also A.W. Eaton, *A Sensible Antiporn Feminism*, 117 ETHICS 674, 680 (2007).

²²¹ See Eaton, *supra* note 214, at 676.

eroticize relations . . . characterized by gender inequality.”²²² This definition excludes gay and lesbian pornography (which is often characterized by liberatory power dynamics), sadomasochistic pornography, and pornography made by and for women.²²³ The problem with inegalitarian pornography, Helen Longino argues, is that it promotes a degrading and dehumanizing portrayal of women.²²⁴ Catherine MacKinnon expanded on this and claims that these “attitudes and behaviors of violence and discrimination which define the treatment and status of half the population.”²²⁵ MacKinnon argues that “pornography serves [to maintain] women’s second-class social status.”²²⁶ This view was tested in *American Booksellers Association Incorporated v. Hudnut*.²²⁷ This case centered around a law created to give a civil action to women that were coerced into pornography, assaulted because of specific pornography, or subordinated through the trafficking in pornography.²²⁸ The Court of Appeals for the Seventh Circuit found the ordinance to be content-based and viewpoint discriminatory because pornography that depicted woman as equals was permissible, but pornography that treated a woman as submissive was not.²²⁹ However, an all-male panel of the court did accept the argument that pornography is a form of sex discrimination.²³⁰ The court stated, “[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination.”²³¹

The ACLU does not need to adopt such a radical view of pornography in order to support the ENOUGH bill. A second portion of the ACLU’s Women’s Rights Project states that the agency is primarily focused on contexts in which there is violence against women.²³² The original definition of revenge porn is “the posting of nude or sexually explicit photos or videos online to degrade or harass someone, usually a former spouse.”²³³ Intent to degrade or harass is arguably a form of violence against women. For example, revenge porn websites allow users to make comments on the victim’s photographs that are abusive and threatening in nature.²³⁴ Comments typically include statements such as “what a dirty bitch” and

²²² *Id.*

²²³ *Id.*

²²⁴ *Feminist Perspectives on Sex Markets*, STAN. ENCYCLOPEDIA OF PHIL., (Sept. 7, 2016), <https://plato.stanford.edu/entries/feminist-sex-markets/>.

²²⁵ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 196 (1989).

²²⁶ *See generally Feminist Perspectives on Sex Markets*, *supra* note 224.

²²⁷ *See Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (“[The City and many amici] maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women.”).

²²⁸ *See* CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 210 (1987).

²²⁹ *See Hudnut*, 771 F.2d at 325.

²³⁰ *See id.* at 329 (“Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women.”).

²³¹ *Id.* at 329.

²³² *Women’s Rights*, *supra* note 219.

²³³ Halloran, *supra* note 7.

²³⁴ *See Bendecik*, *supra* note 3, at 234.

threats of rape or sexual assault.²³⁵ Revenge porn posts also frequently are accompanied by the victim's personal information.²³⁶ This increases the risk of stalking and physical attack as it encourages revenge porn website users to confront the victim offline.²³⁷ Clearly these situations constitute violence towards women, which supposedly the ACLU is committed to eradicating.

The ACLU should also be cognizant of the message it conveys by withholding support for the criminalization of revenge porn: "[W]omen are responsible for men's behavior and they should have known better than to send, or even take, intimate photos."²³⁸ Some claim that an "assumption of the risk argument is a form of gender discrimination, harming the psyches of every female who has been made to feel bad or ashamed about her sexuality, and perpetuating the belief that females, unlike males, should be shamed when personal information about their sexuality is made public."²³⁹

This form of gender discrimination was demonstrated in the study about adolescent sexting performed by Lippman and Campbell. The study showed that females who sexted, even only when responding to pressure from males, were seen as promiscuous, whereas males who sexted often climbed the social ladder.²⁴⁰ In addition, the majority of participants who made negative comments about female sexting were male.²⁴¹ One male wrote, "I have received some pics that include nudity. Girls will send them sometimes, not often. I don't know why they think it's a good idea but I'm not going to stop it . . . I like classy girls so I don't like them as much anymore it makes them look slutty."²⁴²

The assumption of risk argument ignores the right of a woman to exercise sexual autonomy. Sexual autonomy is defined as "permit[ing] individuals to act freely on their own unconstrained conception of what their bodies and their sexual capacities are for."²⁴³ In the context of revenge pornography, a woman chooses to express her sexuality in one particular way a photograph or video.²⁴⁴ At the point when this picture or video is distributed without her consent, her sexual autonomy has been violated.²⁴⁵

The ACLU is typically a champion of the concept of sexual autonomy, specifically in the context of reproductive freedom; for example, saying "access to

²³⁵ Ruth Styles, *Angry Victims of Revenge Porn Reveal How They Were Deluged With Revolting Sexual Comments and Rape Threats After Explicit Photos Were Posted Online*, DAILY MAIL (Aug. 17, 2015, 08:51 PM), <https://www.dailymail.co.uk/femail/article-3200674/Revenge-porn-victims-tell-humiliation-anger.html>.

²³⁶ See *supra* text accompanying note 51.

²³⁷ See Citron & Franks, *supra* note 25, at 351.

²³⁸ Poole, *supra* note 2, at 193.

²³⁹ *Id.*

²⁴⁰ Lippman & Campbell, *supra* note 56, at 374.

²⁴¹ See *id.* at 379.

²⁴² *Id.*

²⁴³ Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously*, 11 L. & PHIL. 35, 70 (1992).

²⁴⁴ See Rachel Budde Patton, Note, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 419 (2015).

²⁴⁵ *Id.*

contraception is critical to an individual's autonomy."²⁴⁶ The ACLU has been involved in several cases related to sexual autonomy,²⁴⁷ including *Griswold v. Connecticut*,²⁴⁸ *Roe v. Wade*,²⁴⁹ *Planned Parenthood v. Casey*,²⁵⁰ and *Curtis v. School Committee of Falmouth*.²⁵¹

Clearly, the ACLU recognizes and supports a woman's right to sexual autonomy in the context of reproductive freedoms. The ACLU has failed to explain why its support of sexual autonomy changes in the context of a woman taking a sexual picture or video. This discrepancy directly perpetuates gender inequality in regard to sexual behavior between men and women.

CONCLUSION

Revenge porn is a pervasive and expanding problem. Revenge porn causes substantial mental and physical harm to its victims. Because of this harm, states and the federal government have made efforts to try and criminalize revenge porn. Yet, the ACLU has repeatedly opposed efforts to criminalize the conduct. Most recently, the ACLU has opposed the ENOUGH Act. This act is the latest in attempts to federally criminalize revenge porn. The ENOUGH Act tries to temper First Amendment concerns with privacy protections. In doing so, a prosecution would require the defendant be aware that the victim expected the image to remain private and that sharing the image could cause harm to the victim. The prosecution would also have to prove that no reasonable person would consider the shared image to touch on a matter of public concern. However, the ACLU argues that despite these protections, the bill still does not pass constitutional muster. The ACLU's primary concern about the bill is that it is overbroad. The ACLU stresses the need for a "malice" standard to ensure that the law is narrowly tailored to meet the privacy interests revenge porn poses. However, the ACLU's approach to revenge porn is inconsistent in several ways. First of all, renowned constitutional law scholars state that the First Amendment does not implore an intent requirement. In addition, Professor Mary Anne Franks and others have shown that the ACLU's

²⁴⁶ *Birth Control*, ACLU, <https://www.aclu.org/issues/reproductive-freedom/birth-control> (last visited Aug. 8, 2019).

²⁴⁷ *About the ACLU Reproductive Freedom Project*, ACLU, <https://www.aclu.org/other/about-aclu-reproductive-freedom-project> (last visited Aug. 8, 2019).

²⁴⁸ In *Griswold v. Connecticut*, the ACLU filed an amicus curiae brief arguing against the Connecticut law prohibiting the prescription, sale, or use of contraceptives, even for married couples. 381 U.S. 479 (1965).

²⁴⁹ The ACLU was also involved in *Roe v. Wade*, which established a woman's right to choose to have an abortion without excessive government interference. After this, the ACLU went on to argue its companion case, *Doe v. Bolton* before the Supreme Court. See *ACLU History: The Roe v. Wade Era*, ACLU, <https://www.aclu.org/other/aclu-history-roe-v-wade-era> (last visited Aug. 8, 2019); see also *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

²⁵⁰ In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the ACLU argued, before the Supreme Court, against the Pennsylvania law requiring spousal awareness prior to obtaining an abortion. *About the ACLU Reproductive Freedom Project*, *supra* note 247.

²⁵¹ In *Curtis v. School Committee of Falmouth*, 516 U.S. 1067 (1996), the ACLU filed an amicus curiae brief in support of the Massachusetts Board of Education's decision to make condoms available in secondary schools. *About the ACLU Reproductive Freedom Project*, *supra* note 247.

stance to revenge porn differs vastly from its approaches in other privacy-related matters. Finally, the ACLU's approach to revenge porn is inconsistent with its own Women's Rights Project goals and its commitment to sexual autonomy. For an organization that has been at the forefront of numerous women's rights issues, this makes the ACLU's stance on this issue all the more questionable.